No. 1257

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE ROMAINE THOMPSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

HAYDEN C. COVINGTON
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TO THE SUPREME COURT OF THE UNITED STATES:

Theodore Romaine Thompson petitions this Court for a writ of certiorari.* He shows unto the Court as follows:

1. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals reversing the judgment in this case is not reported. The opinion does not appear in the record, but it appears as Appendix to this petition. The opinion was withdrawn by an order of the court dated September 27, 1946. [57-58] ** The opinion of the court below affirming the judgment of conviction is reported at 157 F. 2d 787. It appears in the record, [59-64]

* This petition is identical in every respect with the petition in Cox *v.* United States, the first of this group of three companion cases.

** Bracketed figures appearing in this petition refer to pages of printed transcript of record.

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

Judgment of affirmance was rendered and entered October 4, 1946. [64-65] The time for filing petition for writ of rehearing was enlarged. [65] Petition for rehearing was duly filed within the time fixed by the order extending the time for filing petition. [65] The petition for rehearing was denied March 20, 1947. [65] This petition for writ of certiorari is filed within thirty days from the date the judgment of affirmance became final.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in holding that the judgment of conviction should be affirmed because the denial of petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

(2) Did the court below err in failing to hold that the undisputed evidence in this case showed that the denial of petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

(3) Did the court below err in holding that the trial court could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on April 18, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [6-33] At the close of the Government's case petitioner moved for a directed verdict. [23] The motion was denied with exception. [24] At the close of all the evidence, petitioner renewed his motion for directed verdict. [28-29] The case was argued to the jury. [28] The court instructed the jury. [29-33] Petitioner duly submitted requested instruction to the court, which was denied with exception. [32-33, 45] The jury retired and returned its verdict of guilty. [4, 33] By judgment petitioner was committed to the custody of the Attorney General for a period of three years and three months and fined $300.00. [4-5] Petitioner duly served and filed his notice of appeal. [33-34] He was admitted to bail pending appeal. [35-40] He timely filed his assignments of error. [40-42] Bill of excep-

tions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [42-48] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

Petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform.* He reported. Within fifteen or twenty minutes after arriving, petitioner left without permission and intentionally remained away. [60-61] (Also see Appendix.)

Petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U. S. C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. [61-62]

Petitioner's claims as to exemption were at all times consistently, persistently and openly made by him. These claims were the subject of competent proof to the boards through his questionnaire, and evidence was presented at board hearings that, although the petitioner was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, petitioner says that the boards treated his claim as a minister arbi-

* The facts stated here are taken verbatim from the opinion of the Court of Appeals. Since the facts stated by the court below present the issue here there has been no attempt to detail the facts from the evidence in the record.

trarily and capriciously, and proceeded to classify him as a conscientious objector. [61-62] (Appendix)

At the trial all of the proffered evidence relevant to petitioner's claimed status as a minister of religion was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling petitioner to maintain appeals. [62] (Appendix)

With respect to the "competent and substantial" evidence before the boards pertaining to petitioner's ministerial status, the undisputed evidence in the draft board file showed that he was a duly-ordained minister of Jehovah's witnesses, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses.* It revealed that he was regarded by other of Jehovah's witnesses as standing in relation to Jehovah's witnesses and the Watchtower Bible and Tract Society (a religious organization recognized by the Selective Service System) as do the orthodox clergy to their respective religious denominations. There was absolutely no evidence to the contrary in the draft board file and in no respect was petitioner's evidence or his claim for exemption impeached and discredited before the draft boards. The undisputed evidence, therefore, showed that the determination of the draft boards denying petitioner his claim for exemption as a minister of religion was arbitrary and capricious, being in violation of due process of law. [6-29]

* The facts in this paragraph are not taken from the opinion but from the record filed in this case.

How Issues Raised

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [23] and again at the close of all the evidence [28-29] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [23, 28-29] Each motion was denied with exception to petitioner. [24, 28-29]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [32, 33, 45] The requested charge was refused, with exception allowed. [32, 33, 45]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [31-32] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [31-32] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [31-32] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [31-32, 45-46]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (Appendix)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [62]

Specifications of Error

The Circuit Court of Appeals for the Ninth Circuit erred—

(1) In holding that the ruling of the trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

(2) In refusing to follow the decisions of this Court in *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, 67 S. Ct. 301; *Dodez* v. *United States*, 67 S. Ct. 301.

(3) In holding that there was basis in fact for the classification given petitioner by the draft boards when the undisputed evidence showed that petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

(4) In holding that *de novo* evidence could not be considered by the trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

(5) In affirming the judgment of conviction.

Reasons Relied on for Granting the Writ

The decision of the court below is in direct conflict with the holdings of this Court in *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, 67 S. Ct. 301; and *Dodez* v. *United States*, 67 S. Ct. 301. The facts in this case are identical to the facts in the *Gibson* case in so far as the proceedings by the draft boards are concerned and the extent to which the registrant went in order to exhaust his administrative remedies. The difference between this case and the *Gibson* case is that in this case the court allowed all of the draft board file to go into evidence whereas in the *Gibson* case the draft board file was excluded, along with *de novo* evidence. However, the facts in this case in respect to the rulings of the trial court are identical with the facts in the *Dodez* case. In the *Dodez* case, as in this case, the draft board file was received into evidence. Some *de novo* evidence and other proof with respect to the denial of due process of law by the draft board was excluded from evidence. In the *Dodez* case, as in this case, the petitioner urged a motion for directed verdict on the ground that the undisputed evidence appearing in the draft board file established that the petitioner was exempt as a minister of religion from all training and service and, therefore, the prosecution should be dismissed. Inasmuch as the trial court in this case withheld from consideration in the trial court by the court or jury whether the draft boards exceeded their jurisdiction or denied petitioner's claim for exemption without basis in fact, a new trial should have been ordered by the court below as this Court directed in the *Estep*, *Smith*, *Gibson* and *Dodez* cases.

A proper opinion was expressed and a correct disposition of this case was made by the court below in its opinion of April 5, 1946. (Appendix)

Following the rendition of that decision, the Govern-

ment, acting by and through an Assistant Attorney General and attorneys of the Department of Justice, filed a joint petition for rehearing in this and in the two companion cases strongly urging to the court below that the judgment in this case should properly be affirmed because the undisputed evidence appearing from the draft board file showed that petitioner was not illegally classified by the draft boards and, therefore, the holding of the district court was harmless error. Accordingly, the court below was erroneously requested to set aside its judgment and affirm the judgment of the district court.

This was identically the same argument that the Government unsuccessfully made to this Court in the *Smith* case and again in its "Brief for the United States on Reargument" at pages 39-56 in *Gibson* v. *United States,* No. 23, October Term 1946.

On October 4, 1946, the court below accepted this specious and factitious argument of the Government and set aside its decision of April 5, 1946, withdrawing the same, and ordered the judgment of conviction affirmed.

Thereupon petitioner filed his petition for rehearing, calling attention to the fact that the cases of *Gibson* v. *United States* and *Dodez* v. *United States* had been decided by this Court on December 23, 1946, in which it was held, on circumstances and facts identical to the facts in this case, that the judgments of conviction should be reversed and new trials ordered. See Appellants' Joint Petition for Rehearing filed in this case. [65]

In view of the extraordinarily deliberate and intentional departure from the decisions of this Court and the attempted *sub silentio* "overruling" of the decisions of this Court in the *Estep, Smith, Gibson* and *Dodez* cases, this Court should, simultaneously with the granting of the writ of certiorari, reverse the judgment of the court below and order the judgment of the district court reversed and

remanded for a new trial. This should be ordered on the ground that the decision of the court below on April 5, 1946, is correct. It should be done also because the decision of the court below on October 4, 1946, is not compatible with the decisions of this Court in *Estep* v. *United States*, *Smith* v. *United States*, *Gibson* v. *United States*, and *Dodez* v. *United States*.

This action should be taken on the authority of *United States* v. *Bale* 67 S. Ct. 625; rehearing denied 67 S. Ct. 633. See also *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715; rehearing denied 320 U. S. 816.

The petition for writ of certiorari also should be granted because the decision of the court below is directly in conflict with the decision of the Fourth Circuit Court of Appeals in *Poole* v. *United States*, decided January 28, 1947, — F. 2d —.

In holding that there was basis in fact for the classification given petitioner, the court below has passed upon an important question of federal law which has not been, but which should be decided by this Court. There is substance and merit to petitioner's contention that he was exempt as a minister of religion and that there was no basis in fact for the classification given him by the draft boards in this case. See the extensive argument upon this question at pages 83-131 in Joint Brief for Respondent Kulick and Petitioner Sunal in No. 840, October Term 1946, *Alexander* v. *United States* ex rel. *Kulick;* and No. 535, October Term 1946, *Sunal* v. *Large*.

The ruling of the court below that *de novo* evidence was not receivable in the trial court for the purpose of determining whether or not the draft boards exceeded their jurisdiction in ordering petitioner, who was, as a minister of religion, exempt from training and service, to report to the civilian public service camp in question, is a decision

upon an important question of federal law which has not been, but which should be, decided by this Court.

Moreover, the question is analogous to that decided by this Court in *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *Chin Yow* v. *United States*, 208 U. S. 8, 13. To the extent that this particular question here presented as to whether *de novo* evidence should have been received is analogous to that involved in the cases just cited, the decision of the court below is a departure from and in conflict with applicable decisions of this Court. For this reason also the petition for writ of certiorari should be granted.

Conclusion

For the reasons stated, petitioner submits that the writ of certiorari prayed for herein should be granted. He further prays that, in the circumstances of this case, it would be appropriate for this Court to reverse the judgment below and order the judgment of the trial court reversed and the cause remanded for a new trial without further briefs or argument.

Respectfully submitted,

THEODORE ROMAINE THOMPSON
Petitioner

HAYDEN C. COVINGTON
Counsel for Petitioner

Appendix

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

◆

No. 10,917
Wesley William Cox, *Appellant*
v.
United States of America, *Appellee*

No. 10,928
Theodore Romaine Thompson, *Appellant*
v.
United States of America, *Appellee*

Upon Appeal from the District Court of the United States for the District of Idaho

◆

No. 10,942
Wilbur Roisum, *Appellant*
v.
United States of America, *Appellee*

Upon Appeal from the District Court of the United States for the District of Oregon

◆

April 5, 1946

Before: STEPHENS, HEALY and BONE, Circuit Judges.

STEPHENS, Circuit Judge.

Wesley William Cox and Theodore Romaine Thompson were indicted by a United States Grand Jury in the District

of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U. S. C. A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the indictees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309 a) as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him.

It will be seen that § 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or

service but not from registration. The claim mentioned was at all times consistently, persistently and openly made by each registrant. It was the subject of competent proof to the boards through the registrant's questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants here, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals.

After oral argument this court was informed that the Supreme Court of the United States would soon decide two cases, which, it was thought, would control the cases here under consideration. The cases referred to, *Estep* v. *United States* (No. 292) and *Smith* v. *United States* (No. 66), 327 U. S. 144, were treated together and decided on February 4, 1946, in a majority, consolidated opinion.

In the case of *Estep* v. *United States*, the registrant sought in the trial court to defend against a charge that he had wilfully refused to submit to induction into the Navy on the ground that he was an ordained Jehovah's Witness minister of religion and that he had been improperly denied exemption from service by the classifying agencies in arbitrarily and capriciously refusing to fix his classification as IV-D [minister of religion, § 305 (d)]. (Another ground was presented which we need not consider.) This defense was rejected.

It will be seen that the *Estep* case parallels the instant cases, with the difference that Estep was directed to be inducted into one of the armed forces, whereas the three registrants here were directed to go to, and remain in, conscientious objector's camp. In each case (the *Estep* and our cases) the registrant proceeded to the place to which he was ordered. Estep went to the place of induction, where he refused to obey the board's order to submit to induction and, therefore, retained his civilian status. Each registrant in our cases went to camp, retaining his civilian status, but each refused to continue performance of board orders. On the face of these facts each registrant remained a civilian and as such appeared to have committed an offense against the United States under § 311.

In the *Estep* and *Smith* opinion it is said that the Supreme Court in *Falbo* v. *United States*, 320 U. S. 549 (1944), held that a registrant could not defend in a criminal case under § 311 "on the ground that he was wrongly classified and was entitled to a statutory exemption for failure to report for induction into the armed forces or for work of national importance," and that it was therein further held that there is no judicial review of a registrant's classification short of his acceptance for service. All administrative steps must first be taken.

The question posed in the *Estep* case was: Is there a judicial review of a classification in a prosecution under § 311, where the registrant reported, was accepted, but refused to submit to induction? The difference between the *Estep* case and our cases does not distinguish them in principle.

There has been considerable doubt entertained by the courts as to whether or not submission to induction is an administrative step, necessary to be taken before any judicial process can be put to the aid of the registrant under a board's order, but this doubt has been put at rest. Sec-

tion 311 makes a wilful failure to perform any duty required of a registrant by the Act, the rules or regulations, an offense. And it is said in *Billings* v. *Truesdell*, 321 U. S. 542 (1944), that an order to report for induction is such a duty, and it includes the duty to submit to induction. The *Estep* and *Smith* opinion holds that "Submission to induction would be satisfaction of the orders of the local boards, *not* a further step to obtain relief from them." (Emphasis ours.)

It is also held in the *Estep* and *Smith* opinion that the board's authority to hear and determine all questions of deferment or exemption is limited to action within its *jurisdiction* [§310 (a) (2)], but if outside the board's jurisdiction, its decision would not be final [citing *Tung* v. *United States*, 142 Fed. 2d 919 (CCA-1, 1944)]. Again, "If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of law." And, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." In all such cases its action would be lawless and beyond its jurisdiction.

Thus, if a registrant who was an exempt minister, and who was ordered to report to an induction center for induction, or to a camp, there to remain and perform work of national importance, obeyed the order by proceeding to the designated place, but disobeyed it by refusing induction or by refusing to remain in camp, he could defend against a charge under § 311 with proof of his exempt status.

In referring to § 310 (a) (2), which provides that the board's orders are final, the Supreme Court says in the *Estep* and *Smith* opinion: "It means that the courts are

not to weigh the evidence to determine whether the classification made by the local boards was justified." It is obvious that this comment is directed to classifications within the board's jurisdiction.

The *Estep* and *Smith* opinion concludes with the statement: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried.

Reversed and remanded.

(Endorsed:)

Opinion. Filed April 5, 1946. Paul P. O'Brien, Clerk.